

Chairperson Payne and members of the State Public Charter School Commission:

On January 14, 2014, I received the attached letter from the Attorney General's Office. The Executive Director of the State Charter School Commission (Tom Hutton) has refused to recognize this opinion and is continuing to operate under the belief that your Commission can use federal impact aid to supplant funding for charter school facilities. To make matters worse, the use of these funds is documented in Senate Bill 2516. In his numerous testimonies in support of this bill Tom Hutton wrote, "As noted in the bill's findings, the Commission currently is implementing a Facilities Pilot Program for the awarding of funds to charter schools for relatively small-scale facilities projects and has allocated approximately \$680,000 of federal Impact Aid funds to this program from out of a temporary but sizable increase in such funds for the current fiscal year. Funds for the pilot program are planned for distribution around the beginning of the 2014 academic year. This initiative by the Commission has engendered considerable controversy among some of the charter schools, which are anxious about the adequacy of their operating funds, as well as concern that the precedent not be misperceived by the Legislature as a sign that the Commission somehow can address the facilities challenge using existing resources. Despite these concerns, the Commission has seized this opportunity to move ahead with the initiative, in an attempt to demonstrate that a program of investing in charter school facilities will prove a sound investment for the public, and to allow the system to work through any legal and practical issues before any additional state funds are invested."

***Here is what our contract says about use of federal monies:***

8.5. Federal Funding. Pursuant to Sec. 302D-28, HRS, the School shall be eligible for all federal financial support to the same extent as all other public schools. The Commission shall timely distribute federal funds to the School based on the same methodology used by the DOE to distribute the funds to DOE-operated public schools; provided that the Commission may, by a majority vote at a public meeting, elect to employ an alternative distribution method where such discretion is allowed. The Commission shall make the DOE allocation methods publicly available and shall work with the DOE and the School where questions of equity may arise.

***The Commission is bound to follow the law concerning use of federal monies.***

*The federal Office of Elementary and Secondary Education says on its website:*

"Most Impact Aid funds, except for the additional payments for children with disabilities and construction payments, are considered general aid to the recipient school districts; these districts may use the funds in whatever manner they choose in accordance with their local and State requirements. Most recipients use these funds for current expenditures, but recipients may use the funds for other purposes such as capital expenditures. Some Impact Aid funds must be used for specific purposes. All payments are distributed by wire transfer directly to the bank accounts of school districts. School districts use Impact Aid for a wide variety of expenses, including the salaries of teachers and teacher aides; purchasing textbooks, computers, and other equipment; after-school programs and remedial tutoring; advanced placement classes; and special enrichment programs. Payments for Children with Disabilities must be used for the extra costs of educating these children."

***State law says:***

**§302D-28** Federal funds received by the department for charter schools shall be transferred to authorizers for distribution to the charter schools they authorize in accordance with the federal requirements.

**§302A-1401** Administration and use of federal funds, including early education. (a) The board, designated as the administrators of such funds as may be allotted to the State under federal legislation for public educational purposes, subject to such limitations as may be imposed by congressional action,

shall use and expend the funds:

- (1) To improve the program of the public schools of the State, including any grades up to the fourteenth grade or such lower grade as shall be prescribed as a maximum for such purposes by the Act of Congress concerned, by expanding the educational offerings, particularly in the rural districts;
- (2) For the payment of salaries to teachers;
- (3) To employ additional teachers to relieve overcrowded classes;
- (4) To adjust the salaries of teachers to meet the increased cost of living, within such limits as may be fixed by, and pursuant to, state law;
- (5) To provide for the purchase of supplies, apparatus, and materials for the public schools; and
- (6) For any of such purposes and to such extent as shall be permitted by the Acts of Congress concerned.

**§302A-1402** Custodian of federal funds. The director of finance is designated as custodian of all funds received as the state apportionment under any federal appropriations for public educational purposes and the director shall disburse the funds, pursuant to the requirements, restrictions, and regulations of the federal acts under which the funds may be provided, on vouchers approved by the board, or by any subordinate thereunto duly authorized by the board.

**§302A-1403** Authority to secure federal funds. The department, the state public charter school commission, a charter school authorizer, director of finance, and governor may take such steps and perform such acts as may be necessary or proper to secure any such federal funds for the purposes specified in sections 302A-1401 and 302A-1402.

**§302A-1404** Federal impact aid military liaison. (a) The department and the state public charter school commission or an authorizer, as appropriate, may retain and expend federal indirect overhead reimbursements for discretionary grants in excess of the negotiated rate for such reimbursements as determined by the director of finance and the superintendent or the director of finance and the state public charter school commission or an authorizer, as appropriate.

(b) Each fiscal year the department of education may set aside \$100,000 of federal impact aid moneys received pursuant to this section to:

- (1) Establish and fund a permanent, full-time military liaison position within the department of education; and
- (2) Fund the joint venture education forum to facilitate interaction between the military community and the department of education.

The military liaison position established under paragraph (1) shall be exempt from chapter 76 but shall be eligible to receive the benefits of any state or federal employee benefit program generally applicable to officers and employees of the State.

### ***What does the Department say about use of Impact Aid funds?***

<http://www.hawaiipublicschools.org/ParentsAndStudents/MilitaryFamilies/Pages/About-Impact-Aid.aspx>

These federal reimbursements for a portion of the cost of serving federally connected students are critical in supporting all Hawaii public schools and students. The funding supports:

1. School-level substitute teachers;
2. funds permitting one-time supplemental programs; and
3. funds permitting funding shortfalls.

Charter schools receive a proportionate per pupil level of funding from Impact Aid funds as non-charter schools.

***Only the DOE has the authority to fund school level facilities related projects, enter into contracts related to facilities or acquire property:***

**§302A-1504.5** School-level minor repairs and maintenance special fund[;] reporting of carry over

funds. (a) There is established within the state treasury a special fund to be known as the school-level minor repairs and maintenance special fund, into which shall be deposited all moneys collected pursuant to section 235-102.5(b), and any other moneys received by the department in the form of grants and donations for school-level minor repairs and maintenance. The special fund shall be administered by the department and used to fund school-level minor repairs and maintenance. (b) The department shall submit to the director of finance a report that shall be prepared in the form prescribed by the director of finance and shall identify the total amount of funds in the school-level minor repairs and maintenance special fund that will carry over to the next fiscal year. The department shall submit the report to the director of finance within ninety days of the close of each fiscal year and a copy of the report to the legislature no later than twenty days prior to the convening of each regular session.

**§302A-1506** Public school facilities. The department may enter into such contracts, leases, lease-purchase agreements, or other transactions as may be necessary for the acquisition of public school facilities, including any lands for these facilities, on such terms as it may deem appropriate with the concurrence of the director of finance.

***Who decides if “discretion is allowed” when the Commission chooses to distribute federal monies through an “alternative distribution method?” The Commission (as authorizer) has their authority defined in §302D-5. It says they shall “Be responsible for the receipt of applicable federal funds from the department and the distribution of funds to the public charter school it authorizes.”***

***And here is what the contract says about conflicts between the law, the contract and administrative rules (which the Commission does not have yet):***

14.4. Conflict Between Contract, Law and Administrative Rules. In the event of a conflict between this Contract, State law and the administrative rules pertaining to charter schools, the order of precedence shall be State law, followed by administrative rule, followed by the terms and conditions of this Contract.

***Finally, here is what the contract says about resolution of disputes:***

14.5. Disputes Resolution. It is the intent of the parties to communicate on a regular basis in a positive and effective manner. The parties agree to communicate areas of concern as they arise and to address those concerns in a professional manner. Any disputes between the Commission and the School which arise under, or are by virtue of, this Contract and which are not resolved by mutual agreement, shall be decided by the full Commission in writing, within 90 calendar days after a written request by the School for a final decision concerning the dispute; provided that where a disputes resolution process is defined for a particular program area (e.g., IDEA, Section 504, etc.), the Parties shall comply with the process for that particular program area; and further provided that the parties may mutually agree to utilize the services of a third-party facilitator to reach a mutual agreement prior to decision by the full Commission. Any such final decision by the Commission shall be final and conclusive.

**This dispute between the Commission and Connections PCS has arisen under and by virtue of this Contract. It has not been resolved by mutual agreement. Connections PCS is officially requesting a final decision concerning the use of Federal Impact Aid for the proposed “Facilities Pilot Program” within 90 calendar days as provided for in Section 14.5 of the Contract.**

Your Commission, and Mr. Hutton, are also refusing to negotiate a new charter school contract with individual charter schools. Last year, you managed to get a budget proviso that forced our schools to sign the contract or lose most of our per pupil state funding. On February 21, 2014, I gave a letter to Commission staff requesting individual negotiations. On March 6, 2014 our Governing Board chair and I received an email from Jannelle Watson with an attached letter from Catherine Payne and Thomas Hutton. The letter did not address our request to negotiate the contract. We were directed to contact Stephanie Klupinski if we wanted to set up a phone call to discuss this matter with our Governing Board. I responded,

“Stephanie,

I am assuming you have seen the attached document that Tierney (our Governing Board chair) and I received today. Our February 21, 2014 letter called for the beginning of REAL negotiations of the new bilateral contract per §302D-5(4). I think our Governing Board would be more than willing to begin negotiations with a phone call. However, if the intent is to "fine-tune" a boiler plate contract that will be the same for all charter schools, I sincerely doubt that our Governing Board will find any interest in participating. We are seeking to negotiate a unique, bilateral contract.”

On March 7, 2014 Tom Hutton replied, “John, while there are a few school-specific elements, such as each school’s Exhibit A and, if the school wishes propose any, the school-specific elements of the Academic Performance Framework, the rest of what we all are working on here is the baseline accountability provisions that will be applied fairly and even-handedly to all 34 schools, not 34 varieties of them.

If a particular contract provision truly fails to recognize a particular school’s exceptional circumstances, the Commission’s approach is to explore how that provision can be revised to account for those circumstances so that it still works for all schools, in a way that preserves fairness for all.

The collective and individual engagement of the schools is very important to this process. The Commission remains committed to respectfully discussing, carefully considering, and thoughtfully addressing the input it receives.”

It appears that the Commission is recognizing the need for Administrative Rules regarding this contract. It also appears that the Commission may not be following the §91 procedures for the creation of these rules. On April 7, 2014 I requested advance notice of your rulemaking proceedings pursuant to §91-3. I also asked where your proposed state agency rules are being posted on the Internet as provided for in §91-2.6. I have received no response.

This is not the first time Connections has sought to negotiate a Contract based on §302D-5(4). On April 1, 2013 the directors of Laupahoehoe, Hawai’i Academy of Arts & Science, Connections, Kua o ka La, Kula Aupuni Niihau A Kahelelani Aloha, and Halau Lokahi submitted a list of 36 questions and/or concerns with the 3/11/13 version of the charter contract template. One of our concerns (Section 6.2) was addressed in the “FINAL” version of the contract template released on 3/22/13. The previous version would have required charter school administrators to go beyond the scope of the law in punishing our students. We believe there are still many more examples in the current version of the contract where the Commission appears to exceed its authority in overseeing the charter schools.

On April 25, 2013, the directors of Laupahoehoe, Hawai’i Academy of Arts & Science, Connections, Kua o ka La, Kula Aupuni Niihau A Kahelelani Aloha, and Halau Lokahi met with Mr. Tom Hutton, Ms. Karen Street, Ms. Dede Mamiya and other CSAO staff. We attempted to air our grievances concerning the contract and specifically asked Mr. Hutton and Ms. Street to consider inserting language into the contract that would make Section 13.2 unenforceable without administrative rules duly promulgated under §91. They informed us that they believed that Section 13.2 already contains such

language and that we should seek clarification through our deputy attorney general. Our attorney replied, "The language in 13.2 of the contract still allows the Commission to revoke a charter contract (within the 1 year period) for the reasons listed in HRS section 302D-18(g)(1), (3) and (4)." Charter schools can still be closed for the following reasons:

- (1) Committed a material and substantial violation of any of the terms, conditions, standards, or procedures required under this chapter or the charter contract;
  - (3) Failed to meet generally accepted standards of fiscal management; or
  - (4) Substantially violated any material provision of law from which the charter school is not exempted.
- While we six schools would like to "trust" your Commission, our history is plagued with attempts to shut down, micromanage and harass our charter schools. We do not have a history of "trust" where authorizers are concerned and the blatant refusal by this Commission to negotiate this contract has not given us a reason to "trust" your intent as the new authorizer.

On April 29, 2013, I was asked by the CSAO to attend a meeting on Oahu concerning the Special Education Guidelines for charter schools. During our discussion, I mentioned that Section 3.5.2 of the contract is inconsistent with language being proposed by the DOE. The DOE guidelines say, "The DOE will provide the PCS special education related position(s) (not the individual) in accordance with the staffing methodology for DOE schools." Section 3.5.2 says, "The DOE is responsible for reviewing all of the current individualized education programs of special education students enrolled in a charter school and may offer staff, funding or both, to the charter school based upon a per-pupil weighted formula implemented by the DOE and used to allocate resources for special education students in the public schools." The DOE uses the word "will" and the contract uses the word "may" concerning the allocation of positions. I asked Debra Farmer (State Administrator of Special Education) if she had been consulted regarding the provisions in the contract concerning special education. She said that she had not. I pointed out that the language of the contract was not consistent with the guidelines. I showed her the language in the contract and she agreed that "may" should be changed to "shall" in Section 3.5.2. The latest version of the contract still uses "may".

I'd like to also point out another section of the contract that is having a major impact on many of our charter schools: Section 3.4 Graduation Requirements for High Schools. It says, "The School shall comply with BOE Policy 4540..." In our 36 questions, our six charter schools asked, "Are schools required to follow the specific course requirements when classes are taught through a project-based or integrated curricular approach? What is the process/timeline for granting waivers?" While charter schools are accountable for complying with State educational standards, we are not required to implement the curricula taught in DOE schools. By forcing us to employ the BOE Graduation Requirements, we are being forced to utilize the minimum course and credit requirements to receive a high school graduation diploma. The law (§302D-1) defines charter schools as having "the flexibility and independent authority to implement alternative frameworks with regard to curriculum, facilities management, instructional approach, virtual education, length of the school day, week, or year, and personnel management." Again §302D-12 says, "The governing board shall be the independent governing body of its charter school and shall have oversight over and be responsible for the financial, organizational, and academic viability of the charter school, implementation of the charter, and the independent authority to determine the organization and management of the school, the curriculum, virtual education, and compliance with applicable federal and state laws." The law clearly gives us "the independent authority to determine" the curricula in our schools. We have never been forced to follow the DOE graduation requirements. Why are we now being forced into following these requirements?

Finally I would like to, once again, invoke the law in framing our opposition to signing this contract. The definition of a "charter contract" in §302D-1 is, "a fixed-term, bilateral, renewable contract

between a public charter school and an authorizer that outlines the roles, powers, responsibilities, and performance expectations for each party to the contract.” Forcing all charter schools to follow one unamendable contract forces us to respond to the offer under duress. Undue influence is being applied and the Commission is taking advantage of its position of power. We have no free will to bargain. This contract may be considered null and void if challenged in a court of law.

**The dispute between the Commission and Connections PCS has arisen under and by virtue of this Contract. It has not been resolved by mutual agreement. Connections PCS is officially requesting a final decision concerning the Commissions' refusal to negotiate an individual contract with our school. Again, we expect a written response within 90 calendar days as provided for in Section 14.5 of the current Contract.**

Mahalo nui loa

RECEIVED JAN 14 2014

NEIL ABERCROMBIE  
GOVERNOR



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January 9, 2014

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Re: Use of Impact Aid for Facilities Pilot Program

Dear Mr. Thatcher and Mr. Hirakami:

This is in response to your December 24, 2013 letter to the Attorney General requesting answers to the following questions:

1. Does Act 159 of 2013 [Act 159, Session Laws of Hawaii 2013] give the Commission the authority to develop a "Facilities Pilot Program" with federal impact aid funds received from the State of Hawaii DOE?
2. Does the Commission have the authority to distribute federal impact aid funds in a manner that is not consistent with the manner in which federal impact aid funds are distributed to State of Hawaii DOE schools?

Upon review of the applicable law, our short response is that: (1) the Commission is not authorized to create a Facilities Pilot Program under HRS § 302D-E(e); and (2) the Commission may not use or distribute federal impact aid in a manner inconsistent with HRS §302A-1401.

#### DISCUSSION

Federal impact aid is given to states like Hawaii to "provide financial assistance to local educational agencies" burdened by federal government activity. 20 U.S.C. § 7001, *et seq.* The amount requested and awarded to states is based primarily on the amount of federally-connected children being educated in the State; however, awards may also be given

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to cover construction, facilities maintenance (for government owned buildings), and the cost of special education.<sup>1</sup> There is no clear Congressional mandate that these federal funds be used for specific purposes, except for those designated to provide children with disabilities a free and appropriate public education. 20 U.S.C.A. § 7703(d)(2).

At the State level, however, the Board of Education is charged with ensuring that federal impact aid "shall" be used to fund the following enumerated matters:

- (1) To improve the program of the public schools of the State, including any grades up to the fourteenth grade or such lower grade as shall be prescribed as a maximum for such purposes by the Act of Congress concerned, by expanding the educational offerings, particularly in the rural districts;
- (2) For the payment of salaries to teachers;
- (3) To employ additional teachers to relieve overcrowded classes;
- (4) To adjust the salaries of teachers to meet the increased cost of living, within such limits as may be fixed by, and pursuant to, state law;
- (5) To provide for the purchase of supplies, apparatus, and materials for the public schools; and
- (6) For any of such purposes and to such extent as shall be permitted by the Acts of Congress concerned.

HRS § 302A-1401(a).

On or about June 26, 2013, Tom Hutton, Executive Director of the Charter School Commission, proposed use of federal impact aid to fund a facilities funding pilot project.

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<sup>1</sup> Federal impact aid is categorized in four general categories: (1) basic support payments; (2) payments for children with disabilities; (3) facilities maintenance; and (4) construction. Construction grants (both formula and competitive grants) are awarded to local school districts that are heavily impacted by federally connected students. See Elementary and Secondary Education Act, Title VIII, section 8007. It can be used to support school construction, emergency repairs and modernization.



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See CB and Impact Aid School Budgeting Implications Webinar dated 6/26/13  
(<https://www.youtube.com/watch?v=SkT0GeCjLGE>).

In this case, \$4,209,282 in federal impact aid was given by the Department of Education (Hawaii DOE) to the Charter School Commission (Program ID No. 19998, Allocation Number 135) on or about August 1, 2013. The "guidelines for implementation" given by the Hawaii DOE was that: "These Impact Aid funds are considered by the USDOE to be general aid and thus may be used in whatever manner of the recipient's choosing in accordance with State requirements. The Commission may distribute the funds to the individual charter schools as it determines to be appropriate." (emphasis added).

This year, the amount of federal impact aid disbursed by the Hawaii DOE to the Commission (on behalf of the charter schools) increased from previous years. This has been described as an "anomaly" and believed to be a one-time increase. With these funds, the Commission decided to match last year's disbursement of \$285 per pupil to each charter school and retain \$1.2 million to fund a Facilities Pilot Project. In a December 12, 2013 Recommendation Submittal to Terri Fujii, it appears that the amount recommended to be withheld was reduced to \$683,876, with \$564,541 being distributed to charter schools on a "targeted basis" versus a per-pupil distribution. It must be noted that the Commission has not explained whether the money will be primarily used for operational costs (i.e., to fund positions to run the program) or to be distributed to schools in need of facilities funding.

The authority initially cited by Mr. Hutton in the Recommendation Submittal to allow for the use of impact funds for this pilot project was HRS § 302D-28(d), which provides:

Charter schools shall be eligible for all federal financial support to the same extent as all other public schools. The department shall provide all authorizers with all state-level federal grant proposals submitted by the department that include charter schools as potential recipients and timely reports on state-level federal grants received for which charter schools may apply or are entitled to receive. **Federal funds received by the department for charter schools shall be transferred to authorizers for distribution to the charter schools they authorize in accordance with the federal requirements.**

(Emphasis added).

Mr. Hutton then cited to Act 159, Session Laws of Hawaii (2013), which states:

§302D-E Facilities funding. (a) Beginning with fiscal year 2014-2015 and each fiscal year thereafter, the commission may request facilities funding for charter schools as part of its annual budget request to the director of finance.

(b) The legislature may make an appropriation based upon the facilities funding request pursuant to subsection (a).

(c) The governor, pursuant to chapter 37, may impose restrictions or reductions on appropriations for charter schools similar to those imposed on other public schools.

(d) This section shall not limit the ability of the director of finance to modify or amend any allotment pursuant to chapter 37.

**(e) The commission shall develop criteria to determine the distribution of funds appropriated pursuant to subsection (b) to the charter schools. The criteria shall include but not be limited to distribution based on the need and performance of the charter schools.**

(Emphasis added).

The question then is whether these statutes permit the creation of the Facilities Pilot Program using federal impact aid funds. Our answer is no.

### **Statutory Interpretation**

In interpreting the application of any statute, the Hawaii Supreme Court has provided the following guidance:

First, the fundamental starting point for statutory interpretation is the language of the statute itself. Second, where the statutory language is plain and unambiguous, our sole duty is to give effect to its plain and obvious meaning. Third, implicit in the task of statutory construction is our foremost obligation to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. Fourth, when there is doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used in a statute, an ambiguity exists. And fifth, in construing

an ambiguous statute, the meaning of the ambiguous words may be sought by examining the context, with which the ambiguous words, phrases, and sentences may be compared, in order to ascertain their true meaning.

Hawaii Gov't Employees Ass'n, AFSCME Local 152, AFL-CIO v. Lingle, 124 Haw. 197, 202, 239 P.3d 1, 6 (2010).

In instances where two statutes cover the same subject matter, the more specific statute will be favored over a more general one:

This court has stated that “[w]here there is a ‘plainly irreconcilable’ conflict between a general and a specific statute concerning the same subject matter, the specific will be favored.... [W]here the statutes simply overlap in their application, effect will be given to both if possible, as repeal by implication is disfavored.”

State v. Hoshijo ex rel. White, 102 Haw. 307, 315, 76 P.3d 550, 558 (2003)

In this case, HRS § 302D-E appears to be a clear and succinct statute that authorizes and clarifies how the Commission may obtain funding for charter school facilities. First, the Commission may make a facilities funding request as part of its annual budget request to the director of finance. Thereafter, the legislature may make an appropriation based on the facilities funding request; this amount, however, can be restricted or reduced by the governor and reduced by the director of finance. The Commission must create criteria to determine how these funds are to be distributed to the charter schools.

While HRS § 302D-E(e) specifically authorizes the Commission to create distribution criteria, it does not mention the ability to create a Facilities Pilot Project. Moreover, HRS § 302D-E9e) specifically states that the funds to be distributed, for which criteria must be developed, are funds appropriated pursuant to HRS § 302D-E(b) (i.e., funds from the legislature). The legislative history is also void of any mention of authorizing the Commission to create or fund a Facilities Pilot Program, as the stated legislative purpose was to “[a]uthorize the Charter School Commission to request facilities funding for charter schools as part of its annual budget request.” See S.B.244 CD1 CCR 153. Thus, it cannot be said that the legislature authorized the creation of a Facilities Pilot Program under HRS § 302D-E.

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It is also clear that facilities funding under HRS § 302D-E will come directly from the legislature. The language of the statute is clear that any funding disbursed by the Commission under the authority and auspices of HRS § 302D-E(e) must originate from the legislative appropriation made for charter school facilities funding.

Even if it is assumed that the Facilities Pilot Program was authorized -- which it was not -- there is no authority for the Commission to fund such a pilot program with charter school impact aid funds. As stated previously, funds disbursed pursuant to HRS § 302D-E(e) must come from a legislative appropriation made pursuant to HRS § 302D-E(b).

Moreover, federal impact aid is to be used in accordance with HRS §302A-1401, which is the statute that specifically governs the use of federal funds "allotted to the State under federal legislation for public education purposes."<sup>2</sup> This section of the statute lists specific purposes for which these funds may be used, such as the payment of salaries to teachers and to "provide for the purchase of supplies, apparatus, and materials for the public schools."<sup>3</sup> Funding for public school facilities is not an enumerated purpose.

The Commission's reliance on HRS §302D-28(d) to support the use of federal impact funds for facilities funding is misplaced. HRS §302D-28(d) is a general statute that states that "federal funds received by the department for charter schools" are to be distributed in accordance with federal regulations. While both statutes appear to pertain to how "federal funds" are to be used, HRS §302A-1401 is the only one that pertains specifically to federal impact aid (i.e., given pursuant to federal legislation (20 USC § 7701) and is for public education purposes). When there is any conflict between a specific and general statute, the specific statute is favored. State v. Hoshijo ex rel. White, 102 Haw. 307, 315, 76 P.3d 550, 558 (2003). Thus, we interpret the statutes to require the Commission to follow HRS §302A-1401 rather than the HRS §302D-28(d) when it distributes federal impact aid.

We also note that even if HRS § 302D-28(d) applied specifically to federal impact aid, the Commission is still not authorized to use impact aid at its discretion. Section 302D-28(d), HRS, clearly states that federal funds are to be distributed in accordance with "federal regulations." We are unaware of any federal regulations allowing federal impact aid to be used for the improvement of facilities other than buildings owned by the U.S. Department of Education. See Section 8008 of the Elementary and Secondary Education Act.

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<sup>2</sup> An argument may be made that pursuant to HRS §302D-25(a), the Commission is exempt from state laws in conflict with HRS §302D-28(d); however, HRS §302D-25(a) applies to the Charter Schools and not to the Commission or an authorizer.

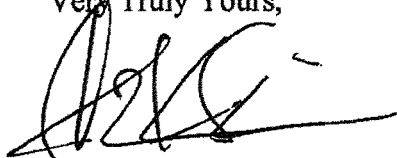
<sup>3</sup> U.S. Department of Education has stated in its Impact Aid Fiscal Year 2013 Budget Request that "Basic Support Payments go into the general funds of these LEAs, which use them for such expenses as teacher salaries, computers, curricular materials, regular and special instruction programs and utilities."

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Because the Commission's proposed use of the impact aid is unclear, it must also be stated that the Commission has no authority to retain federal funds for its own purposes. Pursuant to HRS §302D-5(b)(3), the Commission, as an authorizer,<sup>4</sup> is required to receive "applicable federal funds from the department" and to *distribute* the funds to the public charter schools it authorizes. See also HRS §§ 302D-7 (reporting requirement), 302D-17 (ongoing oversight). The Commission has no statutory authority to retain federal funds intended for charter schools.

Based on the foregoing discussion, we advise that the Commission is not authorized under HRS §302D-E to create a Facilities Funding Pilot Project; nor can it use federal impact aid to fund the project or in any manner inconsistent with HRS § 302A-1401.

Very Truly Yours,



Carter K. Siu  
Deputy Attorney General

APPROVED:



David M. Louie  
Attorney General

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<sup>4</sup> By definition, the Commission has been designated as the "authorizer" for all public charter schools "Commission" means the "state public charter school commission established pursuant to [section] 302D-3 as a statewide authorizer." HRS § 302D-1.